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6 **UNITED STATES BANKRUPTCY COURT**
7 **EASTERN DISTRICT OF WASHINGTON**

8 In re:

9 GIGA WATT, Inc., a Washington
10 corporation,
11 Debtor.

Case No. 18-03197 FPC 7

The Honorable Frederick P. Corbit

**MEMORANDUM IN SUPPORT OF
MOTION FOR ORDER TO SHOW
CAUSE WHY JUN DAM SHOULD
NOT BE SANCTIONED FOR
VIOLATING THE AUTOMATIC
STAY**

14 Mark D. Waldron, the duly appointed chapter 7 trustee in the above-
15 captioned case, hereby submits this memorandum in support of the motion (the
16 “Motion”), filed herewith, for an Order to Show Cause why Jun Dam (“Dam”)
17 should not be sanctioned for violating the automatic stay.

18 **I. JURISDICTION**

19 The bankruptcy court has jurisdiction under 28 U.S.C. §§ 1334 and
20 157(b)(1). This matter is core. 28 U.S.C. §157(b)(2)(A) and (O).

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24 **MEMORANDUM IN SUPPORT
OF TRUSTEE’S MOTION FOR
25 ORDER TO SHOW CAUSE**

II. INTRODUCTION

Dam is once again trying to cut the line and get paid ahead of other creditors. This time, he has sued Perkins Coie LLP and affiliates¹ on a cause of action that belongs exclusively to the estate and that the Trustee has already commenced.² In their respective actions, Dam and the Trustee allege the same facts: Perkins Coie LLP and Lowell Ness (collectively, “Perkins”) agreed to hold token sale proceeds in trust (the “Escrow”) until Giga Watt provided power to token holders.³ If Giga Watt, Inc. (“Giga Watt”) did not provide power within three months of projected dates, token holders could receive refunds from the Escrow. Perkins’ violated the Escrow terms by releasing Escrow funds before Giga Watt had the requisite power capacity.

As both Dam and the Trustee allege in their respective actions, the Escrow completely failed and Giga Watt cratered into bankruptcy. As of the Petition Date, November 19, 2018, token holders who had received neither power nor a refund

¹ See *Dam v. Perkins Coie LLP, et al.*, [Case No. 2:2020-cv-00464](#), commenced in the U.S. District Court for the Eastern District of Washington (the “District Court”) on December 16, 2020.

² See *Waldron v. Perkins Coie LLP, et al.*, [Adv. Case No. 2:2020-ap-80031](#), commenced in this Court.

³ Dam also sues certain affiliates of Perkins.

1 had brought two class actions against Giga Watt and others seeking rescission
2 under section 12(a)(1) of the United States securities laws (the “Securities
3 Laws”).⁴ Earlier in 2018, Giga Watt had settled another rescission action.⁵

4 The Escrow served as a credit enhancement mechanism in Giga Watt’s
5 Initial Coin Offering (the “GW ICO”). Token purchasers would receive either
6 power or their money back. They could trust Giga Watt on this issue because a
7 blue-chip firm would hold the token sale proceeds. The Escrow also hedged
8 against litigation risk by providing immediate access to a refund. The GW ICO
9 was an unregistered securities offering, meaning that any token purchaser could
10 demand rescission on a strict liability basis for one year after the purchase,
11 pursuant to section 12(a)(1) of the United States Securities Act of 1933 (the
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13 ⁴ See *Moss v. Giga Watt, Inc., et al.*, [No. 2:18-cv-00100-SMJ](#), District Court,
14 Complaint, pp. 32-33, ¶ 105, [ECF 1](#) (alleging individual claims against Giga Watt
15 for rescission under the Securities Act); *Balestra v. Giga Watt, Inc., et al.*, [No.](#)
16 [2:18-cv-00103-SMJ](#), District Court.

17 ⁵ See *StormsMedia, LLC. v. Giga Watt, Inc., et al.*, Case No. [2:2017-cv-00438](#),
18 District Court. A fourth case was filed in October 2018, on behalf of a small group
19 of miners who had not bought tokens. They claimed that they were entitled to the
20 same or higher priority to Giga Watt’s facilities as token holders. *Sofair v. Giga*
21 *Watt, Inc.*, et al, No. [2:2017-cv-00438](#), pending in the District Court. Counsel for
22 Sofair is also representing Dam in the District Court Action.

1 “Securities Act”). The Escrow intended to help Giga Watt meet this foreseeable
2 liability. It also signaled good faith. The Escrow would ensure that token holders
3 would receive either power or a refund.

4 The Escrow breach directly injured (1) powerless token holders, who were
5 entitled to Escrow refunds, and (2) Giga Watt, which relied on the Escrow as a
6 backstop in the event of construction delays and refund requests. The Escrow did
7 not intend to protect power token holders, like Dam, except to the extent that it
8 protected Giga Watt and thus his investment. His alleged injury stems directly
9 from Giga Watt’s injury. Thus, Dam’s claims against Perkins are derivative of
10 Giga Watt’s claims and belong to the estate. The District Court Action violates
11 section 362(a)(3) of the automatic stay.

12 III. BACKGROUND FACTS

13 A. Dam’s Power Tokens

14 Dam asserts that he owns approximately one (1) million WTT Tokens
15 entitling him to 50 years of access to one megawatt of Giga Watt’s operating
16 capacity. Dam was satisfied with his investment, stating, “Debtor performed by
17 providing hosting access to facilities according to the contract from the start of
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1 operations at the end of 2017 until the Petition Date.”⁶ In that same complaint he
2 adds, “I was renting [out] all of my WTT Tokens pre-petition”⁷ In his Proof
3 of Claim filed in this case, Dam states that he earned more than \$140,729.24 from
4 his power tokens.⁸

5 **B. The Adversary Proceeding**

6 On November 19, 2020, the Trustee commenced an adversary proceeding
7 against GW Sg., Andrey Kuzenny, and Perkins. The adversary proceeding is
8 entitled, *Waldron v. Perkins Coie LLP*, [Adv. Proc. No. 20-80031](#) (the “Adversary
9 Proceeding”). In the Adversary Proceeding, the Trustee alleges that Perkins and
10 GW Sg. breached their fiduciary duties to Giga Watt by prematurely releasing
11 token sale proceeds from Perkins’ trust account, the Escrow. Perkins had agreed to
12 hold the token sale proceeds of the GW ICO in trust until Giga Watt built the
13 crypto-mining facilities that would generate revenue for token holders.

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16 ⁶ See *Amended Complaint for Breach of Fiduciary Duty; Professional Negligence;*
17 *Unjust Enrichment; Breach of Contract* (“Amended Complaint”), ¶ 24, [AP ECF](#)
18 [No. 10](#), filed in *Dam v. Waldon, et al.* [Adv. Proc. No. 20-80020](#). The Court
19 dismissed Dam’s complaint against Waldron and others. That dismissal is now on
20 appeal to the District Court. [District Court Case No. 2:2020-cv-00351](#).

21 ⁷ Amended Complaint, Exh. Q, [AP ECF No. 10](#).

22 ⁸ See Proof of Claim, [Claim No. 52-1](#), [Attachment 2](#), p. 1.

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1 bankruptcy action.” *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1420 (9th Cir.
2 1995) (quoting *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877
3 F.2d 1333, 1336–37 (7th Cir. 1989)). *Cf. Est. of Spirtos v. One San Bernardino*
4 *County Super. Ct. Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir.
5 2006) (“We . . . reaffirm our previous reasoning and that of our sister circuits and
6 hold that the bankruptcy code endows the bankruptcy trustee with the exclusive
7 right to sue on behalf of the estate.”).

8 Strong policy supports the rule. It prevents individual shareholders, or in
9 this case token holders, from picking off assets from the corporation’s creditors.
10 *See e.g., In re Phillips*, 185 B.R. 121, 127–28 (Bankr. E.D.N.Y. 1995) (“Courts
11 have recognized that a derivative suit may be preferable to a direct action where
12 an award of an asset directly to an individual could impair the rights of creditors
13 whose claims may be superior to that of the prevailing individual.”) (quoting
14 *Glenn v. Hoteltron Systems, Inc.*, 74 N.Y.2d 386, 547 N.Y.S.2d 816, 547 N.E.2d
15 71, 74 (1989).”).

16 In his previous filings with this Court, Dam attested to the strength of his
17 power tokens. The Debtor had provided him with access to 1 MW of Giga Watt’s
18 mining capacity. He had rented out all his tokens. And he had earned more than
19 \$140,000 from his tokens. The Escrow breach did not directly damage him.
20 Instead, it led inexorably to Giga Watt’s collapse, which damaged Dam. Further,
21 *all* token holders were damaged when Giga Watt shut down. Those whose tokens
22 had power, like Dam, lost their revenue stream. Those whose tokens never had

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1 power, now had no hope of gaining either power or a refund. Dam has not alleged
2 any particular injury to him.

3 If Giga Watt had met its construction schedule, then presumably, the vast
4 majority of token holders would have chosen power over a refund and the
5 premature Escrow releases would be moot. However, Giga Watt did not meet its
6 construction schedule, triggering the need for the Escrow, whose funds Kuzenny
7 had misappropriated on Perkins' watch and with Perkins' substantial assistance.
8 Giga Watt should have had a cushion of approximately \$10.8 million to issue
9 refunds for construction delays. Instead, it stood as a defendant in multiple class
10 action lawsuits, all seeking rescission based on the U.S. securities laws, as
11 anticipated. The Escrow was intended as a backstop for Giga Watt in case it fell
12 behind its constructions schedule and for token holders who did not receive power
13 as a result. It did not serve to protect token holders who received power, like Dam.
14 Dam and the other power token holders are not entitled to both power and a
15 refund.

16 Therefore, the District Court Action alleges only claims that are derivative
17 of Giga Watt's claim. As such, it violates the automatic stay.

18 **B. The Court Has the Statutory Power to Sanction Jun Dam**

19 The bankruptcy court has the authority to impose civil contempt sanctions
20 under § 105(a) of the Bankruptcy Code. *Knupfer v. Lindblade (In re Dyer)*, 322
21 F.3d 1178, 1189–90 (9th Cir. 2003). To find a party in civil contempt, the court
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1 must find that the offending party knowingly violated a definite and specific court
2 order. *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693,
3 695 (9th Cir. 1993). The automatic stay is a definite and specific court order.

4 *Dyer*, 322 F.3d at 1190-91:

5 Because the “metes and bounds of the automatic stay are provided by
6 statute and systematically applied to all cases,” *Jove Eng’g v. IRS (In re*
7 *Jove Eng’g)*, 92 F.3d 1539, 1546 (11th Cir. 1996), there can be no doubt
that the automatic stay qualifies as a specific and definite court order.

8 The moving party has the burden of showing a willful violation of the
9 automatic stay by clear and convincing evidence. *Dyer*, 322 F.3d at 1190–91. “A
10 ‘willful violation’ does not require a specific intent to violate the automatic stay.
11 *In re Pinkstaff*, 974 F.2d 113, 115 (9th Cir. 1992). Further, whether the party
12 believes in good faith that it had a right to the property is not relevant to whether
13 the act was “willful.” *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th
14 Cir. 1989). Instead, a party is subject to sanction “upon a finding that the
15 defendant knew of the automatic stay and that the defendant's actions which
16 violated the stay were intentional.” *Dyer*, 322 F.3d at 1191.

17 Jun Dam knew that the automatic stay was in place when he commenced
18 the District Court Action. In the bankruptcy case, he had served as the Chair of the
19 Official Committee of Unsecured Creditors. The Committee was represented by
20 bankruptcy counsel until the bankruptcy case converted to chapter 7 in September
21 2020. Jun Dam also intentionally filed the District Court Action through retained
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1 counsel. His name has been on the District Court's docket as the lead plaintiff
2 since December 2020. Thus, Dam's violation was willful.

3 Once willfulness is established, as it is here, "[t]he burden then shifts to the
4 contemnors to demonstrate why they were unable to comply" with the Court
5 order. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting
6 *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 n. 9 (9th Cir.
7 1992)).

8 **V.**

9 **CONCLUSION**

10 WHEREFORE, the Trustee requests entry of an Order requiring Dam to
11 appear and show cause why he should not be held in contempt for violating the
12 automatic stay.

13 Date: June 18, 2021

POTOMAC LAW GROUP

14
15 By: /s/ Pamela M. Egan
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